

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

TEDDY MORRIS,

Petitioner,

v.

ROB MCKENNA, et al,

Respondents.

Case No. C09-5345RBL

ORDER

THIS MATTER comes on sua sponte.

On June 8, 2009, the Petitioner filed a Petition for Writ of Habeas Corpus and an Application to Proceed *In Forma Pauperis* [Dkt. #1]. He indicated the Petition was filed under 28 U.S.C. § 2241. On July 1, 2009 the Court granted the Application to Proceed *In Forma Pauperis* and directed the Petition be filed and served [Dkt. #5]. The Respondent subsequently filed an Answer and requested that the Petition be dismissed under either 28 U.S.C. § 2241 or § 2254 [Dkt. #12]. On October 20, 2009 a Magistrate Judge issued a Report and Recommendation which analyzed the Petition under 28 U.S.C. § 2254 and recommended that the Petition be dismissed without prejudice because: (1) the Petition was unexhausted; and (2) Petitioner was not “in custody” for purposes of 28 U.S.C. § 2254. [Dkt. #18]. On November 13, 2009, the Court entered an Order adopting the Magistrate Judge’s Report and Recommendation dismissing the Petition [Dkt. #19] and Judgment was entered on November 17, 2009 [Dkt. #20]. The Petitioner filed a Notice of Appeal on December 2, 2009 [Dkt. #22] and the Court entered an Order

1 denying a certificate of appealability on January 5, 2010 [Dkt. #26].

2 The Court has reviewed this matter and is now of the opinion that it has incorrectly analyzed the  
3 Petition under 28 U.S.C. § 2254. It appears that the analysis should have been made under 28 U.S.C.  
4 § 2241 and 42 U.S.C. § 1983. However, because Petitioner filed a Notice of Appeal, this Court is without  
5 jurisdiction to correct the error. Therefore, pursuant to Fed. R. App. P. 12.1, this Court hereby requests  
6 that the Court of Appeals remand this matter to this Court so that it may reconsider its prior Order.

7 The Clerk shall send uncertified copies of this order to all counsel of record, to any party  
8 appearing pro se, and to the United States Court of Appeals for the Ninth Circuit.

9 Dated this 7<sup>th</sup> day of January, 2010.

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12 RONALD B. LEIGHTON  
13 UNITED STATES DISTRICT JUDGE  
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